IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 23, 2001

STATE OF TENNESSEE v. DAVID HOWARD PROFFITT

Direct Appeal from the Criminal Court for Cumberland County
No. 5201 Leon C. Burns, Jr., Judge

No. E2000-00171-CCA-R3-CD
March 1, 2001

The defendant, David Howard Proffitt, was convicted of theft of property over $10,000 and less than $60,000 in value, a Class C felony. See Tenn. Code Ann. § 39-14-105. The trial court imposed a Range I sentence of five years, to be served consecutively to a prior sentence for aggravated assault. In this appeal of right, the defendant claims that the evidence was insufficient to support his conviction and that the sentence was excessive. The judgment is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed.

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and NORMA MCGEE OGLE, JJ., joined.

Joe L. Finley, Jr., Cookeville, Tennessee, for the appellant, David Howard Proffitt.

Paul G. Summers, Attorney General & Reporter; Elizabeth T. Ryan, Assistant Attorney General; and Anthony J. Craighead, Assistant District Attorney.

OPINION

In the spring of 1996, Jack McKinney bought a 1996 Ford dump truck for his business, McKinney Trucking. The truck, which had a unique custom-made bed, was purchased for $89,000. In January 1997, the truck was involved in an accident. Freightliner of Knoxville, which required several weeks to repair the truck, transported the vehicle to the B-Line Company for alignment. The truck was stolen from the B-Line location and McKinney eventually collected $78,000 in insurance proceeds for his loss.

On June 23, 1998, more than a year after the theft, Trooper Jeff Seals of the Highway Patrol in Cumberland County, stopped a late model Ford truck for speeding along Interstate 40. Driven by Steven Selby, an employee of the defendant's brother, the truck bore the name "Dave's Trucking"

on the side. Selby was unable to produce the registration for the truck and the trooper asked for and received permission to get the information off the door jamb. Upon inspection, Trooper Seals saw signs of tampering on the Vehicle Identification Number (VIN) plate on the door. The numbers had been partially removed. A check on the license plate indicated that the truck was registered as a 1977 model. Trooper Seals obtained the VIN from the registered 1977 vehicle and determined the numbers thereof to be a sequential match to the numbers that were still visible on the 1996 Ford truck.

Tommy Callahan, a criminal investigator for the Highway Patrol, determined that the VIN plate on the dump truck had been glued to the door. He confirmed that the VIN on the glued plate had been taken from the 1977 vehicle. Upon examining the dump truck's hidden VIN, Callahan established that it was the same truck stolen in 1997. Upon questioning, the defendant, who had been called to the scene, claimed that he had purchased an old truck from Top Town Ready Mix two years earlier and had used its parts, along with those provided by an unnamed person from Albany, Kentucky, to rebuild the 1996 truck. The defendant claimed that he had invested over $30,000 in the truck.

Robert Harold Phillips, an employee at Top Town Ready Mix, testified that he had sold the defendant a 1977 or 1978 Ford dump truck for about $2,000. He stated that the defendant bought the truck in order to rebuild it. A title assignment on the vehicle showed that the date of the sale was March 21, 1997, about eight weeks after McKinney's truck had been reported stolen.

Jerry Swift, owner of Swift Construction in Cookeville, testified that he purchased a salvaged 1977 dump truck from the defendant on March 24, 1997, three days after the Top Town Ready Mix transaction. He stated that he bought the truck for spare parts and never obtained a title to the vehicle from the defendant.

Pete Stubbs, County Clerk for Cumberland County, testified that he issued the defendant a registration for a 1977 Ford dump truck on March 25, 1997. This was one day after the defendant had purportedly sold the 1977 truck to Swift.

The defendant testified on his own behalf. He claimed that he bought the dump truck from an unidentified man that he met at a Huddle House restaurant in March of 1997. He contended that the man offered to sell a dump truck with low miles at a junkyard in Albany, Kentucky. The defendant asserted that when he inquired about the title, the man replied that because acquiring a title would cost too much, he planned to switch titles with a salvaged vehicle. The defendant testified that he followed the unidentified man to Kentucky and used his "entire life savings" of $35,000 to purchase the truck. He maintained that the unidentified man switched the VIN plate from his 1977 truck and attached it to the 1996 truck in order to avoid purchasing a "builder's title." The defendant testified that he did not know that it was illegal to swap titles or VIN plates on vehicles. He claimed that he had tried, unsuccessfully, to locate the unidentified man since discovering the truck had been stolen.

Bobby L. Bilyeu, who had known the defendant's family for about 35 years, testified that the defendant had a history of mental problems and had been in and out of mental hospitals some 10 to 15 times. Steve Proffitt, the defendant's older brother, testified that his family often had to look after the defendant's business affairs. He said that there were many times that the defendant would give away valuables or sell them at too low a price. He recalled that on one occasion, the defendant sold a $20,000 truck for $600. Jeff Proffitt, the defendant's younger brother, testified that the defendant sold some land and most of his other trucks in order to purchase the 1996 Ford truck. He recalled that the defendant purchased the vehicle for around $35,000 and that "it was pretty much the same when he bought it as it always was." He stated that the defendant was sick the day the truck was stopped on I-40 and had permitted Selby to drive on that occasion. Jeff Proffitt testified that Glenn Hill had purchased the 1996 truck from the insurance company and that he later bought the truck from Hill for $51,000. It was his belief that "if everybody got their money back, or get their truck back and everything, that maybe it might even be easier on my brother."

I

Initially, the defendant complains that there was insufficient evidence to sustain a conviction for theft. He contends that he purchased the dump truck completely unaware that it had been stolen. We disagree.

On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury the as trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). A guilty verdict, approved by the trial judge, accredits the testimony of the witnesses for the state and resolves all conflicts in the proof in favor of the state's theory. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978).

A person commits the crime of theft if, with the intent to deprive the owner of the property, the person knowingly obtains or exercises control over the property without the owner's effective consent. Tenn. Code Ann. § 39-14-103.

At the conclusion of the hearing on the motion for a new trial, the trial court observed as follows:

> [It has been suggested that] the evidence . . . was not sufficient to support a conviction, and I would disagree with that. [I]n order for one to be convicted of theft, it is necessary that the State prove that one knowingly obtained or exercised control over property knowing that it was stolen at the

> time, and so there is sufficient proof . . . to support that conviction. Knowingly, you were in possession of it. Whether or not you knew it was stolen was a question for the jury under the circumstances of paying considerably less than what the truck was worth.
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> [P]aying considerably less than what the market value of the truck was, having a V-I-N number put on this truck that came from a junk truck, a truck that was salvaged in a salvage yard, and bought and then sold for junk, would suggest to the jury that one knowingly did that and exercised control over it. So there is, in this Court's opinion, adequate proof to support the conviction, sufficient proof to support a conviction.

This court concurs in that assessment. In our view, the state established each and every element of the crime by either direct or circumstantial evidence. The dump truck Trooper Seals stopped for speeding was the same as that stolen from the B-Line Company lot more than a year earlier. The defendant's company logo was printed on the side of the truck. The VIN plate on the dump truck bore signs of tampering and had been replaced with one from a 1977 truck that the defendant had previously owned. Moreover circumstances suggested that the defendant sold the 1977 truck three days after purchasing it, nevertheless obtained a license plate and registration for that vehicle, and then placed the license plate and registration on the 1996 truck. The 1996 truck was worth substantially more than the $35,000 purchase price. The jury acted within its prerogative.

II

The defendant also contends that the trial court erred in calculating the length of the sentence due to the misapplication of a statutory enhancement factor. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see also State v. Jones, 883 S.W.2d 597 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210;

State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987). The record in this case demonstrates that the trial court made adequate findings of fact.

In calculating the sentence for a Class C felony conviction, the presumptive sentence is the minimum in the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence above the minimum, but still within the range. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence must then be reduced within the range by any weight assigned to the mitigating factors present. Id.

For a Range I offender, the applicable range for the offense of theft if the value is $10,000 or more, but less than $60,000, a Class C felony, is from three to six years. See Tenn. Code Ann. § 40-35-112(a)(3).

The trial court found the following enhancement factors applicable:

(1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; and

(8) the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community.

See Tenn. Code Ann. § 40-35-114.

The record establishes that the defendant has previous convictions for aggravated assault, reckless endangerment, DUI, misdemeanor theft and trespassing. In consequence, Tenn. Code Ann. § 40-35-114(1) was properly applied.

Next, the defendant argues that enhancement factor (8) does not apply. See State v. Hayes, 899 S.W.2d 175, 186 (Tenn. Crim. App. 1995) (emphasizing that the commission of the offense for which the defendant is being sentenced does not result in the application of 40-35-114(8)). The record shows that the defendant, who had been convicted of aggravated assault in 1995, was sentenced to six years. He was granted immediate probation. While on conditional release for that offense, the defendant pled guilty to trespassing and later, while still on probation, he was convicted of misdemeanor theft. Probation was also granted for the theft offense. While on conditional release for both the aggravated assault and theft convictions, the defendant pled guilty to a reckless endangerment charge and was fined $25. Finally, the defendant pled guilty to improper passing in 1997. He was still on probation for aggravated assault and theft. As such, Tenn. Code Ann. § 40-35-114(8) was properly applied.

In sum, the trial court properly applied enhancement factors (1) and (8) to the defendant's conviction for theft.

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GARY R. WADE, PRESIDING JUDGE